UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LANDMARK LEGAL FOUNDATION **19415 Deerfield Lane, Ste. 312** **Leesburg, VA 20176**	)	
Plaintiff,	)	**Case No. 12-1726 (RCL)**
v.	)	
U.S. ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendant.	)	

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Defendant, the U.S. Environmental Protection Agency ("EPA" or "Agency"), respectfully opposes Plaintiff Landmark Legal Foundation's Motion for Preliminary Injunction (ECF No. 14). This case arises under the Freedom of Information Act ("FOIA") and involves Plaintiff's request for information from EPA, including Plaintiff's request for expedited processing. EPA is processing this request reasonably quickly, in light of the breadth and scope of the request, the time necessary to clarify and narrow the scope of the request, and EPA's first-in-first-out processing policy. EPA correctly determined that Landmark Legal Foundation ("Plaintiff" or "Landmark") was not entitled to expedited processing at the time that they submitted their FOIA request. Landmark is not a member of the news media or primarily engaged in the dissemination of information, and this fails to meet the standard for "compelling need" under FOIA. There is no increased urgency or need to impose an unreasonable and arbitrary deadline at this time. Furthermore, Plaintiff will not suffer any cognizable harm from

waiting a reasonable period of time for EPA to complete processing this FOIA request. The accelerated processing Plaintiff seeks does not advance any public interest, and is not feasible given the need for complete collection and careful review of the responsive records. For any and all of these reasons, Plaintiff's motion should be denied.

FACTUAL BACKGROUND

This case arises from a FOIA request, dated August 17, 2012, and sent to EPA by Matthew C. Forys of the Landmark Legal Foundation. (Attached as Exhibit A). EPA received the FOIA request on August 20, 2012. *Id.* In their FOIA request, Plaintiff sought:

- "*Any and all records identifying the names of individuals, groups, and/or organizations outside the EPA with which the EPA, EPA employees, EPA contractors and / or EPA consultants have had communications of any kind relating to all proposed rules and regulations that have not been finalized by the EPA between January 1, 2012 and August 17, 2012*. For purposes of this request, 'communications of any kind' does not include public comments or other records available on the rulemaking docket"; and

- "*Any and all records indicating* an order, direction, or suggestion *that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012* or the presidential elections of 2012."

Id. at 2. (Emphasis added). Landmark sought a waiver of all fees associated with processing this request. *Id.* Landmark also requested expedited processing of this request on the basis of a "compelling need" because of the "many significant public interests implicated in the possibility that EPA's activities have been politicized" before a presidential election. *Id.* at 6-7. EPA sent a letter to Landmark acknowledging the request on August 21, 2012. Wachter Decl. at ¶5. On August 29, 2012, Larry Gottesman, EPA's National FOIA Officer, sent a letter to Mr. Forys, acknowledging the request and granting Landmark's request for a fee waiver, but denying the

request for expedited processing. (Attached as Exhibit B). The FOIA request was given tracking number HQ-FOI-01861-12. *Id*.

On September 14, 2012, Landmark appealed EPA's denial of expedited processing. (Attached as Exhibit C). EPA's Office of General Counsel sent Landmark a letter on September 19, 2012, acknowledging receipt of the appeal and providing tracking number HQ-APP-00186-12. (Attached as Exhibit D).

On September 27, 2012, Jonathan V. Newton, an attorney in EPA's Office of the Executive Secretariat contacted Mr. Forys by telephone to discuss narrowing the scope of the request so that EPA could process this request in less time. Wachter Decl. ¶ 7. On September 28, 2012, Mr. Newton again contacted Mr. Forys to discuss the scope of the request. Wachter Decl. ¶ 8. This clarification was necessary because of the size and scope of the request, which as written, could potentially apply to over 17,000 EPA employees, located in the Office of the Administrator, the 12 other EPA Headquarters program offices and each of the EPA's Regional Offices. Wachter Decl. ¶ 7. By exchange of email on October 5, 2012, Mr. Forys agreed to narrow the scope of the request to "senior officials" in EPA's Headquarters offices. Wachter Decl. ¶ 8.

On October 18, 2012, Kevin Miller, Assistant General Counsel for the Information Law Practice Group in EPA's Office of General Counsel sent a letter to Landmark denying its appeal for expedited processing. (Attached as Exhibit E). EPA denied this appeal because Plaintiff, a "public interest law firm," had not met its burden to establish that it is "primarily engaged in the dissemination of information" for purposes of meeting the "compelling need" test of 40 C.F.R.

§2.104(e)(ii).[1] Ex. D at 3; Ex. E at 2-3. Additionally, and as explained in EPA's response to Landmark's appeal, Plaintiff did not demonstrate an urgency to inform the public beyond the public's right to know about government activity generally. Ex. E at 3. On October 22, 2012, Landmark filed a complaint with this Court. Pl. Complaint, ECF. 1.

Thus, this is not a case of an agency failing to comply or refusing to process a FOIA request. Landmark's narrowed request is currently at the top of the FOIA processing queue at the Office of the Executive Secretariat within EPA. Wachter Decl. ¶11. EPA, through Assistant United States Attorney Heather Graham-Oliver, informed the Plaintiff on November 29, 2012 that it anticipates completing the response to this request on or before January 31, 2012. Affidavit of Richard P. Hutchison ¶ 7. EPA, through undersigned counsel, has contacted Plaintiff's counsel and attempted to negotiate a schedule for the handling of this litigation, necessarily including the briefing of the parties' motions for summary judgment and the production of a *Vaughn* index if necessary. *Id.* Plaintiff's response was to file the present motion for a preliminary injunction. Plaintiff is seeking:

1. An order compelling production of all records related to a proposed rule titled "Reconsideration of Certain New Source and Startup/Shutdown Issues: National Emission Standards for Hazardous Air Pollutants From Coal- and Oil- Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units" by December24, 2012;
2. An order compelling Defendant EPA to expedite processing of all additional records responsive to its request by January 4, 2013; and
3. An order compelling EPA to preserve all information potentially responsive to its request.

[1] Landmark appeared to concede that the lack of expedited treatment could not reasonably be expected to pose an imminent threat to the life or physical safety of an individual. Ex. D at 1; *see also* 40 C.F.R. § 2.104(e)(1)(i).

For the reasons outlined below, this relief is both inappropriate and unnecessary and Plaintiff fails to satisfy the legal standard for this relief.

LEGAL BACKGROUND

District courts traditionally rely on summary judgment motions to resolve FOIA claims. *See, e.g., Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir 2007). In doing so, the courts generally accord the agency's declarations substantial weight as long as they are made in good faith, reasonably detailed, and not contradicted by other competent evidence in the record. *See, e.g., Assassination Archives & Research Ctr. v. CIA*, 178 F. Supp. 2d 1, 8 (D.D.C. 2001), *aff'd*, 334 F.3d 55 (D.C. Cir. 2003).

A preliminary injunction is an "extraordinary and drastic remedy." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). A party that seeks injunctive relief pursuant to a motion for a preliminary injunction or temporary restraining order must show:

(1) a substantial likelihood of success on the merits;

(2) that it would suffer irreparable injury if the injunction were not granted;

(3) that an injunction would not substantially injure other interested parties; and

(4) that the public interest would be furthered by the injunction.

See, e.g., Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006); *Al-Fayed v. C.I.A.*, 254 F.3d 300, 303 (D.C. Cir. 2001) (affirming denial of a P.I. seeking expedited processing of a FOIA request); *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998).

When seeking a preliminary injunction, the movant has the burden to show that *all four*

factors are met. *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring, joined by Henderson, J., concurring) ("It appears that a party moving for a preliminary injunction must meet four independent requirements"). The requirement of proving up all four elements is a relatively recent development in the law of preliminary injunctions, and traces back to the Supreme Court's recent decisions in *Winter v. NRDC*, 555 U.S. 7 (2009) (requiring showing of irreparable harm), and *Munaf v. Geren*, 553 U.S. 674 (2008).[2] Previously, courts balanced the four factors, including the D.C. Circuit. *See Sanofi-Aventis U.S. LLC v. FDA*, 733 F. Supp. 2d 162, 167 (D.D.C. 2010) (citing cases). In the wake of the Supreme Court's recent decisions, a circuit split has emerged regarding whether courts should balance the four factors or treat them as independent requirements for an injunction to issue. *Id*. (noting that the Fourth Circuit has held that the prior test, which permitted "flexible interplay among the elements may no longer be applied after *Winter*," while the Second,

[2] The majority opinion in *Davis* set forth the traditional language regarding balancing the four factors, *id.* at 1291-92, but then noted that the court did not have need to decide whether to use the stricter standard or the traditional balancing, *id*. at 1292 ("We need not decide whether a stricter standard applies, because the pilots fail even under the 'sliding scale' analysis of Davenport."). In Judge Kavanaugh's concurrence, joined by Judge Henderson, two judges indicated clear support for the stricter standard:

> In light of the Supreme Court's recent decisions, I tend to agree with Judge Fernandez's opinion for the Ninth Circuit that the old sliding-scale approach to preliminary injunctions-under which a very strong likelihood of success could make up for a failure to show a likelihood of irreparable harm, or vice versa-is "no longer controlling, or even viable." *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). It appears that a party moving for a preliminary injunction must meet four independent requirements. To be sure, the third preliminary injunction factor requires a balancing of the equities, but that's an additional requirement, not a substitute for the first two requirements.

Id. at 1296.

Seventh, and Ninth Circuits use a "modified, sliding-scale" approach).

Under *Davis*, however, it appears that the law of this Circuit is that each of the four factors are required, and a movant's failure to establish any of them means the request must be denied. Here, Plaintiff is not entitled to injunctive relief under either approach. *Cf. Northern Air Cargo v. USPS*, 756 F. Supp. 2d 116, 121 (D.D.C. 2010) (recognizing that while "it is unclear whether the 'sliding scale' is still controlling in light of the Supreme Court's decision in *Winter*, the court need not decide this issue because plaintiff's request for a preliminary injunction fails even under the less stringent 'sliding scale'" test).

ARGUMENT

Plaintiff cannot establish any of the four elements for a preliminary injunction. In the alternative, even if it could establish some of them, it would still fail the balancing of the four factors under the now-outdated balancing test previously used in this Circuit. In either case, Plaintiff's motion for a preliminary injunction should be denied.

I. Plaintiff Cannot Show A. Likelihood of Success on the Merits.

Plaintiff Landmark Legal Foundation cannot establish a likelihood of success on the merits of its claim. The statutory text of FOIA permits a requester, prior to suing in district court, to seek "expedited processing" of its request, but only upon a showing of "compelling need" or such other circumstances as the agency may recognize through its own FOIA regulation. *See* 5 U.S.C. § 552(a)(6)(E)(i)(I). *See also* 40 C.F.R. § 2.104(e)(i)-(ii) (EPA's regulation, providing for expedited processing on the same two grounds as the statute). A person requesting expedited processing must demonstrate to the agency a "compelling need" which, according to the statutory standards, may consist of one or both of the following:

> (1) failure to obtain requested records on an expedited basis . . . could reasonably be expected to pose an imminent danger to the life of physical safety on an individual; or
>
> (2) for a "person primarily engaged in disseminating information to the public, an urgency to inform the public concerning actual or alleged Federal Government activity."

5 U.S.C. 552(a)(6)(E)(v). *See generally Al-Fayed v. CIA*, 254 F.3d 300, 309 (D.C. Cir. 2001) (affirming denial of preliminary injunction that sought expedited processing). The requester bears the burden of showing that expedition is appropriate. *See id*. at 305 n.4.

Plaintiff argues that it will succeed on the merits because it is "entitled to full FOIA processing of its records request" when the request seeks records that are "created or obtained by the agency" and are "under agency control." *Cf. Washington Post v. Dep't of Homeland Security*, 459 F. Supp. 2d 61, 68 (D.D.C. 2006) (finding substantial likelihood of success on the merits to grant a preliminary injunction where the agency had refused to process the request on the grounds that the requested records were not 'agency records' under FOIA). This argument is irrelevant to Plaintiff's request for relief and irrelevant to the merits of this case.

EPA has not asserted that the information Plaintiff seeks is not an "agency record" or stated that EPA will not comply with producing disclosable records pursuant to Plaintiff's request. Rather, EPA is complying with FOIA. EPA is currently processing Plaintiff's FOIA request, is collecting the relevant records from EPA offices, and has provided Plaintiff with a date of January 31, 2013 for completing the processing. Wachter Decl. at ¶11. January 31, 2012, is a reasonable completion date, to complete the processing and review of responsive records, it having been established after an agreement was reached as to the breadth and scope of the request. Wachter Decl. at ¶ 8-9.

Although Plaintiff was properly denied expedited processing by the Agency at both the initial request and administrative appeal stage, it nevertheless seeks an order of expedited processing by this Court. Plaintiff does not dispute that there is no "imminent threat to the life or physical safety of an individual" at stake here. Ex.C at 1. Plaintiff, a public interest law firm, is not a media organization *primarily engaged* in the dissemination of information to the public. Therefore it can not meet the regulatory and statutory standards for expedited processing and consequently, fails to demonstrate a likelihood of success on the merits of its present claim.

To succeed on the merits of its claim of "compelling need," Plaintiff must demonstrate both that it is "primarily engaged in the dissemination of information to the public" and that there is an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552 (a)(6)(E)(v)(II). Plaintiff cannot demonstrate that it meets its burden and therefore, is not likely to succeed on the merits of its claim.

A. Plaintiff is not Primarily Engaged in Dissemination of Information to the Public

Both the FOIA statute and EPA's regulations demand that a requester seeking expedited processing demonstrate that it is "primarily engaged in the dissemination of information to the public" in order to meet the second basis to demonstrate "compelling need." In order to meet this standard, EPA's regulations state that a requester who is not a full time member of the news media must establish that it is "a person whose primary professional activity or occupation is information dissemination." 40 C.F.R. § 2.104(e)(3).

While the case law interpreting the phrase "primarily engaged in dissemination of information to the public" is sparse, one court that has interpreted this provision has made it clear that legal advocacy organizations such as Landmark do not meet this standard. *See Am. Civil*

Liberties Union of Northern Cal. (ACLU-NC) v. Dep't of Justice, 2005 WL 588354 (N.D. Cal., March 11, 2005) (examining the legislative history of the E-FOIA provision to determine that the American Civil Liberties Union of Northern California, a legal advocacy group, does not meet the standard that Congress intended for "primarily engaged in the dissemination of information"). In contrast, the case cited by Plaintiff does not directly address the issue of whether a legal advocacy group meets the expedited processing standard, but instead finds that the Electronic Privacy Information Center ("EPIC"), a very different type of organization than Landmark, is "primarily engaged in the dissemination of information to the public" because EPIC is a representative of the news media. *See Am. Civil Liberties Union v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004). The question of whether ACLU was primarily engaged in the dissemination of information to the public was left unaddressed by the court. *Id.*

Landmark, similar to the ACLU, states that it is a "tax-exempt, public interest law firm." Ex. C at 3. In order to support its contention that it is primarily engaged in the dissemination of information to the public, Landmark stated in its appeal that it would "post information on its web site; include the information in its newsletters; disseminate information via various widespread distribution technologies; publish articles in large circulation print media; and issue press releases to a wide range of media outlets." *Id.* But while that proposed activity may be sufficient to demonstrate qualification on a case by case basis for a fee waiver, it does not demonstrate that Landmark, as an organization, is *primarily* engaged in the dissemination of information to the public. A virtually identical argument was rejected by the District Court in *ACLU-NC* because the legislative history of this provision made clear that, to qualify for

expedited processing, information dissemination must be *the* main activity of the requester." *ACLU-NC*, 2005 WL 588354 at *9, *citing* H.R. REP No. 104-795 at 26.

Instead of stating that Landmark is "primarily engaged in disseminating information to the public," Landmark's declarant vaguely claims that "*[a]mong* Landmark's primary activities is the dissemination to the public information obtained through the [FOIA]." Hutchinson Decl. at 5 (emphasis added). Not only does this single sentence not meet the "primarily engaged" dissemination standard, but Landmark provided no evidence in support of this claim.

Indeed, Landmark's public web site[3] demonstrates that it is a public interest law firm primarily engaged in legal activity, such as filing legal complaints and amici curiae briefs in multiple federal and state cases and filing comments on rulemakings. [4] For example, on its web page, Landmark highlights that its most recent activity was to file an "amicus curie" brief in an upcoming case.[5] Moreover, as discussed in more detail below, Landmark's claimed irreparable

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[3] http://landmarklegal.org (*accessed* December 17, 2012).

[4] *See, e.g.* http://landmarklegal.org/DesktopDefault.aspx?tabid=159; http://landmarklegal.org/DesktopDefault.aspx?tabid=136 (*accessed* December 17, 2012). On its site, Landmark offers the following update on activities:

"Please select the "NEA Accountability" or "Environmental Accountability" links located within the left navigation panel to view Landmark's complaints and other court documents filed against the National Education Association (NEA), the Environmental Protection Agency (EPA), the Bureau of Land Management (BLM), the Forest Service and the Fish and Wildlife Service." http://landmarklegal.org/DesktopDefault.aspx?tabid=136.

[5] From the front page at http://landmarklegal.org (*accessed* December 17, 2012):

"December 14, 2012: Landmark Legal Foundation today filed an amicus curiae ("friend of the court") brief defending the state of Arizona's efforts to protect against illegal aliens attempting to vote in state elections. Landmark's new brief can be found by clicking this link: Landmark's Amicus Brief."

injury is the inability to comment on an EPA rulemaking, a harm that is not relevant to a media entity.

Allowing public interest law firms such as Landmark to receive the expedited processing intended for media requesters would be contrary to the purpose and legislative history of the FOIA, and would result in agencies such as EPA expediting many requests from sophisticated litigants and public interest law firms in support of their litigation and advocacy activities. This would come at the expense of the news media and the general public. Expedited processing requests must be advanced in front of other requests, including requests from the public at large. It is for this reason that the one court to have squarely examined the issue rejected the contention that legal advocacy groups are "primarily engaged in the dissemination of information to the public" under FOIA. *ACLU-NC*, 2005 WL 588354 at *8-10.

B. Plaintiff does not Demonstrate an "Urgency to Inform the Public"

Furthermore, Plaintiff's request does not meet the legal standard of "urgency to inform the public concerning actual or alleged Federal Government activity." To determine if a FOIA requester has demonstrated the requisite "urgency to inform" courts must consider three factors:

1) Whether the current request concerns a matter of current exigency to the American public;
2) Whether the consequences of delaying a response would compromise a significant recognized interest; and
3) Whether the request concerns federal government activity.

Al-Fayed, 254 F.3d. at 310. While EPA concedes that Landmark's request concerns federal government activity, the request does not concern a matter of current exigency to the American public and the consequences of delaying the response until January 31 will not compromise any significant recognized interest.

The interests that Landmark alleges in its motion for a preliminary injunction are speculative at best. In its initial request for expedited processing, Landmark stated that the reason for expedited processing was to determine if the Obama Administration "had improperly politicized the EPA," or to determine if EPA was "intentionally concealing its regulatory activity from an unwary public," which Landmark alleged were issues that should be considered by the public before voting in the presidential elections of 2012. Ex. A at 6-7. No specific harm was identified beyond the vague allegation that delays in rulemaking "prevents the American public from being able to engage in timely, thoughtful debate over the extent of regulation and management at EPA." *Id.* Now Landmark alleges that a delay in producing responsive records "could affect legal challenges" to finalized regulations – however, no specific legal challenge was identified. Pl. Motion for Prelim. Injunction, ECF 14 at 6. Similarly, Landmark alleges that "the public would be denied any opportunity to submit adequate comments should any records responsive to the FOIA request pertains to the [particular rule in question]." *Id.*

These sorts of speculative harms are insufficient to support the need to demonstrate success on the merits of an expedited processing claim for purposes of a preliminary injunction. *See*, *Long v. Dep't of Homeland Security*, 436 F. Supp. 2d 38, 42-43 (D.D.C. 2006) (holding that the allegation that information was necessary in order to provide the information to persons who wish to file briefs in a particular case was not sufficient to show a likelihood of success on the merits on an expedited processing claim); *Al-Fayed*, 254 F.3d at 310. The information that would be necessary for the public to understand the substance of a proposed rule is required to be included in the public docket for the proposed rule, which is available online. (Wachter Decl. at ¶ 18). The public currently has the opportunity and ability to comment on the current Office of Air

and Radiation proposed rule or any other proposed rule. EPA's regulatory agenda additionally gives the public the opportunity to debate the agency's priorities and proposed rulemaking activities for the upcoming year.[6]

C. Plaintiff is not Entitled to the Production of Documents on an Arbitrary Timeline

Finally, even if expedited processing had been granted, the statutory provisions of FOIA would then have directed EPA to "process *as soon as practicable* any request for records to which [they have] granted expedited processing." 5 U.S.C. § 552(a)(6)(E)(iii) (emphasis added). As the Senate Report accompanying the FOIA amendments which inserted the expedited processing procedures explains, the intent of the expedited processing provision was to give certain requests priority, not to require that such requests be processed within a specific period of time:

> Once such a need is demonstrated, and the request for expedited processing is granted, the agency must then proceed to process the request "as soon as practicable." *No specific number of days for compliance is imposed by the bill since depending on the complexity of the request, the time needed for compliance may vary*. The goal is not to get the request processed within a specific time period, but to give the request priority in processing more quickly than would otherwise occur.

S. Rep. 104-272, 1996 WL 262861, *17 (May 15, 1996) (emphasis added); see also H. R. Rep. No. 104-795, reprinted at 1996 U.S.C.A.A.N. 3448, 3461 (Sept. 17, 1996) ("certain categories of requesters would receive priority treatment of their requests"). Thus, the expedited processing provision of FOIA is an ordering mechanism, allowing certain FOIA requesters to jump to the head of the line and avoid the ordinary "first in, first out" processing queue. *See, e.g.*, *Long*, 436 F. Supp. 2d at 44. It does not create a date certain timeline for an agency to complete processing.

[6] *See* http://resources.regulations.gov/public/component/main?main=UnifiedAgenda (*accessed* December 18, 2012).

Accordingly, when a request does successfully jump to the front of the line, "practicability" is the standard governing the agency's processing time for the expedited request, and the traditional court remedy is an order reflecting that standard, rather than a date certain deadline. *See American Civil Liberties Union v. DOJ*, 321 F. Supp. 2d 24, 38 (D.D.C. 2004) (Huvelle, J.) (granting request for expedited processing and ordering that DOJ "shall process plaintiffs' requests for all records relating to section 215 consistent with 5 U.S.C. § 552(a)(6)(E)(iii) and 28 C.F.R. § 16.5(d)(4) ('as soon as practicable')"); *Edmonds v. FBI*, 2002 WL 32539613, *4 (D.D.C. 2002) (Huvelle, J.); *cf. Leadership Conf. on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (Lamberth, J.) (ordering DOJ to "expedite processing of plaintiff's FOIA requests and produce the requested records to plaintiffs as soon as practicable, but no later than September 28, 2006, two years from the date on which the complaint was initially filed," a deadline which was more than nine months from the date of the order). EPA's deadline of January 31, 2013 represents the earliest practicable timeline for the Agency to fully comply with Plaintiff's request, which encompasses documents from multiple offices across the Agency and requires extensive coordination and review. Wachter Decl. at ¶11-12, 15.

II. Plaintiff Cannot Show Irreparable Injury.

Even under the traditional balancing of the four preliminary injunction factors, no injunction may issue in the absence of an irreparable injury, no matter how strongly the other factors might support the movant. *See Winter*, 129 S. Ct. at 375. *See also CityFed Fin. Corp. v. Off. of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995); *Farris v. Rice*, 453 F. Supp. 2d 76, 78 (D.D.C. 2006). The moving party bears the burden of establishing that, absent an injunction, it will suffer an injury that is "both certain and great," and that "there is a clear and present need

for equitable relief to prevent irreparable harm." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Although FOIA requesters' "desire to have [their] case decided in an expedited fashion is understandable, that desire, without more, is insufficient to constitute the irreparable harm necessary to justify the extraordinary relief" of a preliminary injunction. *Judicial Watch v. Dep't of Homeland Security*, 514 F. Supp. 2d 7, 10 (D.D.C. 2007). If an agency has failed to satisfy its FOIA obligations, the plaintiff will receive the requested records at the conclusion of the litigation. The availability of that corrective relief makes it particularly difficult for FOIA plaintiffs to demonstrate that irreparable harm will ensue absent interim injunctive relief. *See Judicial Watch*, 514 F. Supp. 2d at 10.

Here, there is no cognizable harm from waiting for EPA to process Plaintiff's FOIA request in the ordinary course. Plaintiffs allege irreparable injury because "a delay in producing responsive records could affect legal challenges to finalized regulations." However, it is in no way clear how the information requested may bear on a legal challenge to an EPA regulation. While Plaintiff alleges that the records are relevant to "the propriety" of forthcoming regulations, Plaintiff cannot demonstrate what, if any, legal effect or legal consequence results from the expedited disclosure of the purported communications about the political timing of issuing regulations. Plaintiff also fails to explain how the requested conversations about timing of EPA's actions would be necessary for the public to comment on the substance or merit of a particular rule.

EPA's rulemaking process is, by definition and by law, public. To use the particular example that Plaintiff cites as creating the need for this injunction, the rulemaking docket for the

proposed rule titled "Reconsideration of Certain New Source and Startup/Shutdown Issues: National Emission Standards for Hazardous Air Pollutants From Coal- and Oil- Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units," 77 Fed. Reg. 71323 (November 30, 2012) is public. *See* also 77 FR 72294 (December 5, 2012) (providing notice that the proposed reconsideration rule was inadvertently published in the Final Rule section of the Federal Register). The Clean Air Act's Section 307(d)(2), (3), and (4) contains the docketing requirements for proposed rules, such as the proposed reconsideration rule at issue here. Section 307(d)(5) contains the requirement to accept comments on the proposed rule and offer a public hearing and 307(h) requires the comment period to be at least 30 days. If a public hearing is held, the record must be held open "for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information." CAA § 307(d)(5)(iv). Section 307(d) requires the Agency to consider and address the information submitted by the public and provide the basis and purpose of any final rule. *Id.* And, if a citizen or group believes that the Agency's rule is improper or that the Agency should be promulgating rules that it is not, both the Administrative Procedure Act and the CAA provide a mechanism for an interested person to petition for the issuance, amendment, or repeal of a rule. 5 U.S.C. § 553(e); 42 U.S.C. § 7607(d) (CAA § 307(d)). Similarly, any other rules that EPA may be considering will require public notice and public comment before taking effect, regardless of the timing of the notice.

Finally, Plaintiff alleges that irreparable harm may result because, as this Court is well aware, EPA erred over ten years ago in processing a FOIA request from this Plaintiff. *See*

Landmark Legal Foundation v. Environmental Protection Agency, 272 F.Supp.2d 70 (D.D.C. 2003) (sanctioning the Agency for destruction of potentially FOIA-responsive records at the 2000-2001 change in Presidential administrations). However, that case is inapposite here. As a preliminary factual matter, EPA is not undergoing a change in administrations. Furthermore, allegations of potential harm due to possible retirement or other separation of current employees are speculative at best. *See Al-Fayed*, 254 F.3d at 311, n. 12 (holding that the district court was correct to find an argument for potential harms based on federal government employees leaving the agency speculative). Moreover, EPA has taken affirmative steps to preserve information responsive to the request, including issuance of a litigation hold. Thus, Plaintiff's allegation that information risks being lost if no preliminary injunction is granted are unwarranted. Wachter Decl. ¶ 16. Plaintiff's pointing to a request that was received and processed over ten years ago is insufficient to demonstrate bad faith here.

For any of these reasons, Plaintiff has failed completely to show irreparable harm.

III. The Balance of Harms Disfavors a Preliminary Injunction.

The third element for a preliminary injunction is a balancing of the harms to EPA and other third parties. Consistent with EPA's first-in-first-out policy, Plaintiff's FOIA requests is already at the head of the line. Wachter Decl. ¶ 13. Plaintiff then claims that there is no additional burden on the Agency to produce responsive records because of our Federal Records Act obligations. However, Plaintiff's request is not limited to "records" under the Federal Records Act. FOIA requests such as the request from Plaintiff for "all communications" regarding a particular topic may encompass information beyond the scope of the Federal Records Act. *See generally*, U.S. Department of Justice Office of Information Policy, "*FOIA Update:*

What is an Agency Record?" Vol. II, No. 1, 1980.

In addition, even if the request were limited to "records" as defined by the Act, the activities of searching for, compiling, and reviewing responsive records to a particular FOIA request across multiple EPA offices takes a considerable amount of time. An arbitrary and rushed deadline to partially process this request would solely serve to divert resources from and slow the Agency's complete response to this request Wachter Decl. at 14. The proposed deadline would also force EPA to divert resources away from other statutory and regulatory obligations in order to process Plaintiff's request, at no benefit to the public. *Id*. In addition, accelerated production could result in the inadvertent and improper disclosure of potentially sensitive attorney-client communications and deliberative information due to hasty collection and review. *Id.*

EPA is complying with its obligations under FOIA to process the request in a reasonable manner. Where the agency is processing Plaintiff's broad request in a responsive, reasonable and prioritized manner, and expects to complete the processing and release of releasable and responsive records in approximately five weeks after Plaintiff's proposed timeline, the balance of harms strongly disfavors the extreme remedy of a preliminary injunction.

IV. A Preliminary Injunction is not in the Public Interest.

Similarly, the preliminary injunction is not in the public interest. Congress set forth standards for an agency to accord expedited processing to certain requests, and this Court should be slow to expand the grounds on which a requester can force expedited processing beyond those statutory bases. Indeed, were the Court to accept Plaintiff's argument, it would surely encourage sophisticated requesters to seek preliminary injunctive relief as a matter of course. And the

"public interest" purpose of complying with FOIA would fit neatly into every such plaintiffs' motion for injunctive relief. But neither the public interest nor the equities are well served by permitting sophisticated FOIA requesters to avoid the requirements of the FOIA, and to disrupt its orderly process. *See, e.g., Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 22-25 (1974); *Columbia Packing Co., Inc. v. USDA*, 563 F.2d 495, 500 (1st Cir. 1977); *cf. The Nation Magazine v. Dep't of State*, 805 F. Supp. 68, 74 (D.D.C. 1992) (finding that injunctive relief in FOIA case would harm the public interest by disrupting the "orderly, fair, and efficient administration of the FOIA"). "Given the finite resources generally available for fulfilling FOIA requests, unduly generous use of the expedited processing procedure would unfairly disadvantage other requestors who do not qualify for the treatment." *Al-Fayed*, 254 F.3d at 310.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the motion for preliminary injunction be denied.

December 19, 2012

Respectively submitted,

RONALD C. MACHEN JR.,
D.C. BAR#447889
United States Attorney
for the District of Columbia

DANIEL F. VAN HORN,
D.C. Bar #924092
Civil Chief

By: */s/ Heather Graham-Oliver*
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Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LANDMARK LEGAL FOUNDATION 19415 Deerfield Lane, Ste. 312 Leesburg, VA 20176 Plaintiff, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Defendant.	)	Case No. 1:12-cv01726 (RCL)

DECLARATION OF ERIC E. WACHTER

1. I, Eric E. Wachter, Director of the Office of the Executive Secretariat ("OEX") within the Office of the Administrator of the U.S. Environmental Protection Agency ("EPA" or "Agency"), declare that the following statements are true and correct to the best of my knowledge and belief and that they are based upon my personal knowledge and on information supplied to me by employees under my supervision and employees in other EPA offices.

2. I have served as the OEX director since June 2009. My 20-person office has four business lines: processing Freedom of Information Act ("FOIA") requests for the Office of the Administrator; maintaining the records of the Administrator and Deputy Administrator; managing the Administrator's and Deputy Administrator's executive correspondence; and administering the EPA's electronic correspondence tracking system. During my time as OEX director I served as vice chair of the Council of Federal Executive Secretariats in 2011 and as chair of the Council in 2012.

3. I make this declaration in support of the EPA's Opposition to Landmark Legal Foundation's ("Plaintiff" or "Landmark") Motion for Preliminary Injunction. Documents responsive to Plaintiff's FOIA request originate in multiple Agency offices in EPA headquarters. However, due to the complexity and scope of the request, the EPA's Office of the Executive Secretariat is coordinating and supervising the Agency's response. I am personally familiar with Plaintiff's FOIA request, and I am overseeing the response to the request in my supervisory position as Director of the Office of the Executive Secretariat.

Landmark Legal Foundation's FOIA request

4. On August 20, 2012, the EPA received a FOIA request from Matthew C. Forys with the Landmark Legal Foundation. This FOIA request was dated August 17, 2012. A true and correct copy of this FOIA request, stamped "Received August 20, 2012," is attached to this declaration as Exhibit A.

5. In its August 17, 2012, FOIA request, Plaintiff sought:

- Any and all records identifying the names of individuals, groups, and/or organizations outside the EPA with which the EPA, EPA employees, EPA contractors and / or EPA consultants have had communications of any kind relating to all proposed rules and regulations that have not been finalized by the EPA between January 1, 2012 [sic] and August 17, 2012. For purposes of this request, 'communications of any kind' does not include public comments or other records available on the rulemaking docket; and
- Any and all records indicating an order, direction, or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012.

Plaintiff also sought expedited processing and a waiver of all fees associated with processing this request. On August 21, 2012, the EPA's National FOIA Office sent a letter to Plaintiff acknowledging receipt of this request and providing the request's tracking number, HQ-FOI-01861-12. The request was then assigned to the Office of the Executive Secretariat.

6. My office was notified on August 29, 2012, that the EPA's National FOIA Officer sent a letter to Plaintiff, granting the request for a fee waiver but denying the request for expedited processing. The letter stated that the EPA would respond to this request as expeditiously as possible. A true and correct copy of this letter is attached to this declaration as Exhibit B. Plaintiff then filed an administrative appeal, dated September 14, 2012, and received by the Office of General Counsel on September 19, 2012, challenging the denial of its request for expediting processing.

7. After several days of internal discussion regarding the breadth of the EPA's rulemaking process and the volume of records generated by that process, on September 27, 2012, Jonathan V. Newton, an attorney under my supervision in the Office of the Executive Secretariat contacted Plaintiff by telephone to discuss the complexity of this request and options for narrowing the scope. This discussion was necessary because the request, as written, could potentially apply to more than 17,000 EPA employees, located in the Office of the Administrator, the 12 other EPA headquarters program offices and each of the EPA's regional offices.

8. On September 28, 2012, Mr. Newton attempted, without success, to follow up with Plaintiff regarding the request. By exchange of email with Mr. Newton on October 5, 2012, Mr. Forys, on behalf of Plaintiff, agreed to narrow the scope of the request to "senior officials" in the EPA's headquarters offices, with senior officials being identified as program administrators, Deputy Administrators and chiefs of staff.

9. On October 19, 2012, my office was notified that the EPA's Office of General Counsel had denied Landmark's appeal for expedited processing by letter dated October 18, 2012. A true and correct copy of this letter is attached to this declaration as Exhibit C.

The EPA's Processing of Plaintiff's FOIA Request

10. The Office of the Executive Secretariat processes approximately 120 FOIA requests for the Office of the Administrator every year and coordinates many requests for the entire Agency. The requests processed by my office are generally complex, involving large volumes of records, records from multiple geographic areas, cross-cutting programmatic issues, interagency coordination issues and involve a variety of FOIA exemptions that are reviewed for discretionary release to provide the greatest amount of disclosure possible. My office employs two full-time employees to process FOIA requests and generally follows a "first-in, first-out" policy when responding to FOIA requests. When requests are narrowed and the complexity reduced, we are often able to process those requests more quickly and respond to them before they become first in the queue. This is accomplished without delaying the processing of older requests.

11. Plaintiff's FOIA request, as narrowed by agreement, is a priority for my office. As noted above, the request entails the search and collection of records from each of the program offices in the EPA's headquarters. As of December 14, 2012, my office has collected approximately 1,600 pages of responsive records. My office, through Assistant United States Attorney Heather Graham-Oliver, has informed the Plaintiff that we anticipate completing our response to this request on or before January 31, 2013. My office is still collecting responsive records but anticipates completing the collection, processing and review of those records by the projected response date.

12. Our preliminary review of the documents collected indicates that many of the documents contain peripheral references to rules or rulemaking, but are ultimately non-responsive to Plaintiff's request. This preliminary review also identified records from other

Executive Branch agencies with which the EPA is required to consult before finalizing any release determination. Similarly, there are records from multiple EPA program offices; OEX routinely consults with the individual offices that provide responsive records on the review and potential release of records related to their program. Portions of the collected records may also be subject to FOIA exemptions; these portions must be properly identified, then further reviewed for discretionary release, and redacted when appropriate.

Plaintiff's Motion for a Preliminary Injunction

13. On December 13, 2012, my office was informed that Plaintiff had filed a Motion for a Preliminary Injunction, seeking disclosure of what Plaintiff asserts to be a subset of records responsive to their overall FOIA request. My office received a copy of the motion for a preliminary injunction on December 13, 2012. Upon review I find that meeting the requested December 24, 2012, production date for information related to the "Reconsideration of Certain New Source and Startup/Shutdown Issues: National Emission Standards for Hazardous Air Pollutants from Coal- and Oil- fired Electric Utility Steam Generating Units and Standards of Performance for Fossil Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units" would be extremely difficult within the allocated time because of the complexities of the request and the pre-existing Agency priorities that would be affected.

14. Many of the records identified would originate from the Office of Air and Radiation ("OAR"), giving them heightened interest in the review of these records. However, OAR staff is currently responding to contemporaneous court-ordered deadlines to complete tasks related to the issuance of new rules. Completing a separate review for only records related to the

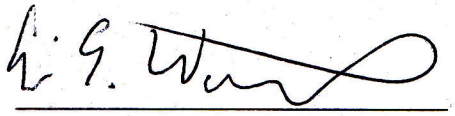
specific rule cited by Plaintiff would adversely affect OAR's compliance with existing court deadlines, unnecessarily duplicate efforts, increase FOIA processing time and disrupt the EPA's ability to meet the January 31, 2013, deadline for completion of Plaintiff's FOIA request.

Preservation of Responsive Records

15. On October 23, 2012, certain EPA staff, including OEX staff, was sent a litigation hold notice issued by an Attorney-Advisor in the EPA's Office of General Counsel, advising that all information responsive to this FOIA request must be preserved. The hold notice was sent through the Encase Litigation Hold Module, which is the electronic tool that EPA now uses to issue all litigation holds. I certified that I read and understood the meaning and scope of the litigation hold notice, and that I will comply to the best of my ability with the EPA's obligation to preserve information relevant to this FOIA litigation. My staff has been instructed to comply with all preservation obligations for relevant information concerning this FOIA request and FOIA litigation.

16. My staff and I are also aware of our obligation to preserve records under the Federal Records Act as well as the obligation to preserve information that is responsive to a FOIA request. Additionally, my staff and I are familiar with and understand the EPA's Interim Policy, "Preservation of Separated Personnel's Electronically Stored Information Subject to Litigation Holds."

17. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.



Eric E. Wachter

Executed this 19th day of December 2012.

EXHIBIT A

FOIA Request
Matthew Forys to: FOIA HQ
Cc: Pete Hutchison
Please respond to Matthew Forys

08/17/2012 04:37 PM

Dear Sir or Madam:

Attached please find Landmark Legal Foundation's FOIA request regarding the delay of EPA regulations.

If you have any questions or comments, please contact the undersigned.

Matthew C. Forys
Landmark Legal Foundation
19415 Deerfield Ave
Suite 312
Leesburg, VA 20176
703-554-6104

703-554-6119 (facsimile)Final FOIA Delay of Regulations.pdf

LANDMARK
LEGAL FOUNDATION
THE RONALD REAGAN LEGAL CENTER

August 17, 2012

Via Express Mail and Electronic Mail

National Freedom of Information Officer
U.S. Environmental Protection Agency
1301 Constitution Ave., NW
Room 6416 West
Washington, DC 20004
hq.foia@epa.gov

Re: Proposed Rules, Summer/Fall 2012

To Whom It May Concern:

This is a Freedom of Information Act Request pursuant to 5 U.S.C. Section 552 *et seq.* relating to published reports that the Environmental Protection Agency ("EPA") is intentionally delaying the issuance of controversial new regulations until after the November elections. Reports also indicate that the Obama Administration "is seeking to issue regulations before the Nov. 8 elections that may bolster its messaging." (Exhibit A, "EPA Positioned To Stay Under Radar Through 2012 Election Season," InsideEPA.com, July 17, 012, available at http://insideepa.com/Inside-EPA-General/Inside-EPA-Public-Content/insider-special-July-17-2012/menu-id-565.html) The charges have come from multiple sources and suggest several troubling possibilities: the Obama Administration is improperly politicizing EPA activities, EPA officials are attempting to shield their true policy goals from the public, and/or EPA officials themselves are putting partisan interests above the public welfare.

For example, the Bozeman Daily Chronicle reports that "a growing number of regulations are being delayed at federal agencies or at the White House" including EPA regulations. (Exhibit B, "As the Election Nears, New Regs Facing Delays," Bozeman Daily Chronicle, July 31, 2012, p. A4.) Politico.com reports that, "Even some Democrats say the White House has responded to political reality in slowing down environmental regulations." In fact, more EPA-generated rules were held up in the review stage of the White House's Office of Information and Regulatory Affairs (OIRA) than any other department or agency. (Exhibit C, Jonathan Allen and Erica Martinson,"EPA Wears the Bulls-Eye," Politico.com, June 20, 2012, available at http://www.politico.com/news/stories/0612/77626.html) Politico.com also writes that "Some say [Obama] truly believes in regulatory restraint during tough economic times. Others see a crass political calculation at play: Don't give Romney any more ammunition before the election - and then open the floodgates after the polls close." (Exhibit D, Darren Samuelsohn

and Jonathan Allen, "President Obama's Administration Slow-walks New Rules, Politico.com, July 12, 2012, available at http://www.politico.com/news/stories/0712/78419.html)

Accordingly, this FOIA request seeks information relating to any EPA rule or regulation for which public notice has not been made, but which is contemplated or under consideration for public notice between January 1, 2012 and the date of this request.

Given the timeliness of this matter and the public interest in the unprecedented privacy concerns raised, Landmark Legal Foundation ("Landmark") respectfully requests that this records request be given expedited processing. Moreover, as Landmark is a tax exempt organization with a long record of widely disseminating public records through various media outlets as part of its public education program, Landmark requests the waiver of all fees and costs associated with this request.

I. Records Requested

Landmark seeks disclosure of the following records[1] **from January 1, 2012 to August 17, 2012** relating to:

1. Any and all records identifying the names of individuals, groups and/or organizations outside the EPA with which the EPA, EPA employees, EPA contractors and/or EPA consultants have had communications of any kind relating to all proposed rules or regulations that have not been finalized by the EPA between January 1, 2012 and August 17, 2012. For the purposes of this request, "communications of any kind" does not include public comments or other records available on the rulemaking docket.

2. Any and all records indicating an order, direction or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012.

II. Fee Waiver and Expedited Processing

Landmark seeks a fee waiver and expedited processing of this request.

A. Fee Waiver

Environmental Protection Agency ("EPA") regulations state:

> Records responsive to a request will be furnished without charge or at a charge reduced below that established under [40 CFR 2.107(c)] when a FOI Office determines, based on all available information, that disclosure of the requested

[1] The term "records" as used herein includes all records or communications preserved in electronic, written, or printed form, included but not limited to correspondence, documents, data, photographs, video recordings in any format, audio recordings in any format, faxes, files, guidance, guidelines, evaluations, instructions, analyses, technical manuals, technical specifications, training manuals, or studies.

information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. 40 CFR 2.107(l)(1) (2011).

EPA regulations further provide that four factors will be considered when determining whether a requester has satisfied the first requirement, i.e., whether the FOIA production is in the public interest.

(i) Whether the subject of the requested records concerns "the operations or activities of the government";

(ii) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(iii) The contribution to an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding."

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. 40 CFR 2.107(l)(2)(i)-(iv) (2011).

EPA regulations further dictate that the Agency employ the following factors when determining whether a requester has satisfied the second requirement, i.e., whether the FOIA production is or is not in the requester's commercial interest.

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure;

(ii) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, which disclosure is "primarily in the commercial interest of the requester." A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. 40 CFR 2.107(l)(3)(i)-(ii) (2011).

Landmark satisfies each of these factors.

1. Release of Requested Records is in the Public Interest.

The FOIA requires the Agency to waive fees when disclosure of the requested record is in the public interest. 5 U.S.C. § 552(a)(4)(A)(iii), Long v. BATF, 964 F. Supp.494, 498

(D.D.C. 1997). Further, "the amended statute 'is to be liberally construed in favor of waivers for noncommercial requesters.'" McClellan Ecological Seepage Situation v. Carucci 835 F.2d 1282, 1284 (9th Cir. 1987), quoting 132 Cong. Rec. SS-14298 (Sept. 30, 1986) (statement of Sen. Leahy). Senator Leahy went on to explain that the 1986 amendment's purpose was "to remove the roadblocks and technicalities which have been used by various federal agencies to deny waiver or reduction of fees under FOIA." 132 Cong. Rec. S-16496 (Oct. 15, 1986).

As stated above, the EPA has set forth four factors to determine whether a release of requested records is in the public interest. Landmark satisfies each of these factors.

a. Whether the subject of the requested records concerns "the operation or activities of the government."

Landmark seeks EPA records related to the EPA's communications with external groups and individuals, including executive branch officials, over proposed rules or regulations. Proposing rules and regulations and the process leading up to such proposals are government activities. Clearly, the requested information concerns the operations or activities of the government.

b. Whether the disclosure is "likely to contribute to an understanding of government operation or activities."

The disclosure of the EPA records sought will contribute to the public's knowledge of EPA's regulatory process. Although comments are sought from the public about new regulations, not all communications relating to the process are readily available to the public. The release of records showing communications between the EPA and outside groups and individuals, including executive branch officials, would help shed light on government activities that aren't conducted in public view. This would undoubtedly contribute to an understanding of government operation or activities.

c. Whether the disclosure of the requested information will contribute to "public understanding."

The disclosure of the requested information will contribute to the public understanding of the EPA operations as a result of Landmark's long record of educating the public with information gathered through FOIA requests.

Upon receipt of this information, Landmark will promptly analyze and disseminate the requested material. Landmark will take several steps, among others, to ensure that the public has access to the information, thus ensuring that the information will contribute to the "public understanding" of the EPA's conduct and operations:

1. Landmark will post responsive information on its web site (www.landmarklegal.org), which is accessed regularly by thousands of individuals and makes the information available to potentially millions of citizens;

2. Landmark will utilize its extensive contacts in radio broadcasting to ensure proper public dissemination of requested records;

3. Landmark will include the information in its newsletter, which is distributed to thousands of individuals, groups, and the media;

4. Landmark will disseminate the information via its widespread distribution technology, which reaches hundreds of media outlets, reporters, editorial writers, commentators and public policy organizations;

5. Landmark staff will use the information to publish articles in print media, many of which are widely circulated. Landmark has successfully published such numerous articles in the past;

6. Landmark will issue press releases to specific media outlets; and

7. Landmark staff will appear on television and radio programs.[2]

Landmark has a proven record of ensuring that information it receives pursuant to FOIA requests garners widespread attention in print, electronic and broadcast media. Landmark's investigations have been cited by the Associated Press, The Wall Street Journal, The Washington Post, The Washington Times, and Fox News Channel.

d. Whether disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

The disclosure of EPA information, including documents, electronic mail, audits, reviews and reports, will contribute significantly to the public understanding of government operations or activities. The possibility that individuals within the EPA consider political ramifications during the rulemaking process and alter their schedule according to the electoral calendar would significantly contribute to the public understanding of government operations or activities. Indeed, if individuals within the EPA discuss these considerations with outside groups or receive instructions to alter their regulatory timetable, the general public would have great interest in such information and would have a significantly greater understanding of the EPA's true activities. Disclosure could demonstrate that the EPA is attempting to shield its true policy intentions from public view during the election season- the time when many Americans are most focused on policy issues such as environmental regulation. Disclosure of such records will allow Landmark to determine if the EPA seeks to protect the public wellbeing first and foremost.

Landmark clearly satisfies each of these four factors. Consequently, disclosure of the requested materials is in the public interest.

[2] See Judicial Watch, Inc. v. Rosotti, 326 F.3d 1309, 1314 (D.C. Cir. 2003). Here, the Court determined that an entity who provided "nine ways in which it communicates collected information to the public" sufficiently justified how disclosure would contribute to the public's understanding as to the activities of the federal government.

2. Disclosure of Requested Material is Not in Landmark's Commercial Interest.

In order for a fee waiver to be granted, the disclosure of the requested material must not be in the commercial interest of the requester. The EPA sets forth a two-part test in determining whether the requester has a commercial interest in the records release: (1) The Agency determines whether the requester has a commercial interest that would be furthered by the requested disclosure; (2) If the Agency determines the requester has a commercial interest, the Agency will engage in a balancing test to determine whether the identified commercial interest outweighs the public interest in disclosure. 40 CFR 2.107(l)(3)(i)-(ii) (2011).

Thus, in order to trigger the second part of the commercial interest test, a requester must have a commercial interest in the records release.

Landmark does not have any commercial interest in the release of the requested records. Obtaining, analyzing, and disseminating this information is consistent with Landmark's mission to educate the public concerning the activities of federal agencies. Landmark has no commercial interest of any kind, nor can it as a 501(c)(3) public interest non-profit organization. Since Landmark satisfies the first part of the commercial interest test, the balancing of the requester's commercial interest against the identified public interest is inapplicable.

B. Landmark's Request Should Receive Expedited Processing.

In order to receive expedited process, a FOIA request must show a "compelling need" by either: (1) establishing that the failure to obtain the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or (2) if you are a person primarily engaged in disseminating information, by demonstrating that an urgency to inform the public that actual or alleged Federal Government activity. 40 CFR 2.104 (e)(i)-(ii) (2011).

1. There is a Compelling Need For Public Disclosure of the Requested Records.

There is a compelling need for the immediate release of the information requested. With respect to entities "primarily engaged in disseminating information," a compelling need is demonstrated by an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. Section 552(a)(6)(E)(v)(II). Among the factors to be considered as to whether there is a compelling need are "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." ACLU, 321 F.Supp.2d at 29.

The requested records related directly to several matters of tremendous public interest and debate as shown by the attached exhibits, including the delay of the rulemaking process because of an upcoming election. This delay raises the possibility that the Obama Administration has improperly politicized the EPA, the possibility that the EPA's leadership is

intentionally concealing its regulatory activity from an unwary public, and/or the possibility that the EPA's leadership is putting the partisan interests of a particular candidate above the safety of the general public by delaying controversial regulations. Each one of these issues is a matter for immediate and full disclosure.

There are many significant public interests implicated in the possibility that the EPA's activities have been politicized. The health and wellbeing of the public as well as the economic wellbeing of the country are at stake with improper environmental regulation. Delay puts these at risk and prevents the American public from being able to engage in timely, thoughtful debate over the extent of regulation and the management of the EPA. Furthermore, these issues regarding EPA's regulatory activities (the EPA's fulfillment of its responsibilities to inform the public and submit to appropriate congressional oversight, and the possibility that the EPA has put partisan interests above the health and wellbeing of the general public) should be considered by the American public before voting in this year's presidential and congressional elections. In short, Landmark meets the factors for a compelling need.

2. Landmark is Primarily Engaged in Disseminating Information.

As part of its mission as a tax-exempt, public interest law firm, Landmark investigates, litigates and *publicizes* instances of improper and/or illegal government activity. As stated above, Landmark will take various steps to disseminate responsive information to the public. Specifically, Landmark will post information on its web site; include the information in its newsletters; disseminate information via various widespread distribution technologies; publish articles in large circulation print media; and issue press releases to a wide range of media outlets.

Moreover, Landmark's work is regularly reported on in national print, broadcast and electronic media outlets, including the *Washington Post, Washington Times, The New York Times, Wall Street Journal,* and many other national publications. Landmark's work is often discussed on national radio talk shows including *The Rush Limbaugh Show*, and *The Sean Hannity Show*. Landmark's president is a nationally syndicated talk show host, and while not in any way affiliated with Landmark, the Foundation's activities are regularly discussed on the program, which is heard by millions of Americans throughout the country. Landmark's only purpose in seeking this information, furthermore, is to disseminate such information to the public.

Landmark has thousands of supporters throughout the United States who are regularly informed through newsletters and other correspondence of the Foundation's activities. Landmark exists only through the donations received from the general public and does not accept any government funds. Accordingly, Landmark must disseminate information about its activities to the general public in order to function.

In Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d 5 (D.D.C. 2003), the D.C. District Court found that a public interest group was "primarily engaged in disseminating information" for purposes of the FOIA. The court reasoned that he group "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience." Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d

5, 11 (D.D.C. 2003)(citing National Sec. Archive v. U.S. Dep't of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

As noted on Landmark's website, "Among Landmark Legal Foundation's primary activities is to disseminate to the public information about the conduct of governmental agencies and public officials that runs afoul of constitutional limits or ethical standards." Landmark gathers information of potential interest to the public, especially those with a conservative viewpoint, analyzes the information, and then creates a report or summary of that information which it distributes to Landmark's audience through newsletters, reports, and its webpage. Landmark's audience includes its supporters, including official advisors, news media, visitors to its website and the general public when Landmark officials discuss the information in print, television and radio.

If Landmark's FOIA Request is not expedited, the potential exists for spoliation of evidence that could demonstrate improper Agency conduct. Expediting Landmark's Request will allow Landmark – and the public – to understand an issue of national interest.

Please note, Landmark has previously been involved in extensive litigation arising from a governmental agency's failure to properly produce documents in accordance with its obligations under the FOIA. See Landmark Legal Foundation v. Environmental Protection Agency, 272 F.Supp.2d 70 (D.D.C. 2003). In that case, the EPA destroyed records in violation of a preliminary injunction and failed to properly circulate Landmark's Request to relevant departments within the Agency. Consequently, the Agency was found in civil contempt of court. Landmark fully expects the EPA to fully comply with the legal mandates set forth in the FOIA.

Furthermore, please provide assurances that EPA officials are taking steps to prevent destruction of repositories of information that may hold records responsive to this request. Additionally, be aware that any actions taken in contravention of the Agency's responsibilities will be raised if this request becomes the subject of litigation.

III. Conclusion

If you intend to deny this request in whole or in part, Landmark requests that you provide specific and substantive justifications with full citation to applicable exemptions and supporting case law.

Please also note, while Landmark realizes that the EPA considers requests for fee waivers and expedited processing on a case-by-case basis, the EPA has granted Landmark's requests in the past. Moreover, Landmark has successfully litigated the issue of whether it qualifies for a fee waiver in federal court.

For the reasons stated above, Landmark asks that the EPA grant Landmark's fee waiver and grant its request for expedited consideration. You may contact Matthew Forys at (703) 554-6100 if you have any questions. Please deliver responsive records to Mr. Forys's attention at the following address:

Matthew Forys
Landmark Legal Foundation
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176

Certification

Pursuant to Agency regulations and as required by law, I certify, to the best of my knowledge, that the above facts are true and correct.

Mark R. Levin
President
Landmark Legal Foundation

Exhibit A

INSIDEEPA.COM
an online news service from the publishers of Inside EPA

Insider Special -- July 17, 2012

Insider Special -- The Unfinished Agenda

EPA Positioned To Stay Under Radar Through 2012 Election Season

Posted: July 17, 2012

Editor's Note: You can read all the background stories and documents referenced in this special report by signing up for a free, one-month trial to InsideEPA.com (see box on this page).

EPA and its regulations have long-been a favorite target of critics but the agency is positioning itself to largely fly under the political radar through the elections.

The agency completed most of its controversial rules months ago, and is now killing some and delaying many others until November or later, while preparing to release relatively popular, non-controversial items such as its vehicle greenhouse gas (GHG) rule before the elections.

"I think we all understand that there are political windows that are better and others that are worse," says one environmentalist.

A former Bush administration official says EPA intentionally sought to establish deadlines for controversial measures that would fall after the election "no matter what." And it has put many discretionary items "on the slow track."

In an early indication of the administration's pre-election priorities, a top EPA transport official said recently that completion of the vehicle GHG rule, which is expected to cut gasoline consumption, is a "top priority," while a pending Tier III fuel and engine rule, which many critics said would raise gasoline prices, would be delayed.

The former Bush official says the Tier III standard -- which had drawn charges that EPA was seeking to further raise gasoline prices when they briefly spiraled upward this spring -- "was an easy one to delay," especially because the agency can synchronize it with its vehicle GHG rules that are years away from taking effect.

Most recently, EPA officials July 13 announced they had dropped a controversial rulemaking that would have required livestock operators to report a host of data to the agency under the Clean Water Act -- an issue that was riling many producers in Iowa, a key election battleground, and other important farm states. And EPA July 16 said it had renegotiated a legal deadline for a controversial stormwater control measure, from 2012 until 2014.

As a result of such efforts, EPA faces no legal mandates to issue major rules between now and the elections, with several deadlines pegged for December, such as for a pending final fine particulate matter air quality standard and a final Portland cement rule package.

The agency is also expected not to finalize until after the election its proposal setting a first-time greenhouse gas (GHG) new source performance standard (NSPS) for new power plants despite winning a sweeping June 26 ruling from the U.S. Court of Appeals for the District of Columbia Circuit broadly backing its GHG regulatory program. EPA maintains it has "no plans" to issue GHG standards for existing sources but could do so late this year, several sources say.

Also likely delayed until after the election: a proposed guidance for permitting hydraulic fracturing operations that use diesel fuel, final cooling water standards for power plants, "uniform" air toxics standards for chemical and other industrial plants, guidance for determining when isolated wetlands and other marginal waters are subject to regulation under the water law, the "Tier III" fuel and engine standards, and a long-delayed rule setting standards for disposal of coal ash.

One industry source notes that the administration was able to delay the fracking permitting guidance and the "uniform" air toxics standards by extending the comment deadline -- a clear indication that the measures will not go final anytime soon. "The administration is not interested in any new rules that they don't have to do between now and the election," the source says.

Additionally, because EPA's final NSPS for the oil and gas sector has not yet been published in the *Federal Register* months after it was signed, any challenges to that rule will be delayed.

Political Messaging

But the administration is seeking to issue regulations before the Nov. 8 elections that may bolster its messaging. Key among them is the GHG vehicle rules for model years (MY) 2017-2025, which EPA delivered to the White House for review July 16, in time for its release in the midst of election season.

The rule, which has widespread support including from most automakers, will likely allow the administration to make a host of key arguments, including highlighting its efforts to curtail GHG emissions, improving fuel efficiency and demonstrating the potential economic benefits of environmental regulations -- the latter of which would likely play well in Michigan, Ohio and other auto manufacturing states that are also key swing states.

Similarly, the administration is likely to issue its revised package of air and waste rules regulating incinerators and boilers that will weaken an earlier final rule to address industry criticism.

While they were not able to win broader industry support, the Obama re-election campaign is nevertheless highlighting EPA's controversial power plant air toxics rule, alongside the vehicle GHG rules. "The new [power plant] rules will help to clear our skies of pollutants that can make health problems like asthma and bronchitis worse, saving up to 17,000 lives per year," the campaign website says.

The former Bush official says that "if something is not done now, it's pretty well going to slide" until after the election, adding that "absolutely the last point in time" a rule would be signed is mid-September to avoid chances of a new administration immediately overturning it. "The most conservative thinking says don't even bother because if the administration flips [the new administration] will go back and take a look at what you did anyway. Or if it doesn't flip then you can put it out at the end of the year."

The source adds that EPA is also "in a pretty good place" with its Cross State Air Pollution Rule (CSAPR), which has been challenged in the D.C. Circuit and where a ruling is expected imminently. "If the court comes out tomorrow morning and [remands or vacates it], there is probably a space where they say they are evaluating the court opinion" and do not take any new action for months. If EPA wins, then it is another legal victory for the agency.

EPA air chief Gina McCarthy said at a July 10 forum that the agency would push back compliance deadlines if the agency prevails in the challenge, saying the agency would be "very sensitive" to state and utility needs for more time.

A second industry source notes that the Obama administration started with a number of controversial items "dumped in its lap early on, some of which it took on willingly and some the product of deadline litigation, particularly in the case of the Clean Air Act. . . . They coupled must-dos with want-to-dos to make for a very busy first term, particularly the first three years. What's happened now in 2012 is a combination of presidential election reticence as well as some of these obligations drying up. . . . It is a slightly odd confluence of events."

The environmentalist agrees that not much is going to move before the election but vows to continue to press the agency to act on important measures.

While EPA is "certainly not shut down for the rest of the term," the source says, "it's very likely that none of this stuff gets done before the election." Still, the source says it is possible some stalled items could move. "The obvious question for them is do they think it is either something no one is really going to pay attention to or something industry wants done, which could be the case with the boiler air toxics standards because it weakens them."

House Hits

Despite the agency's attempts to slow down rulemakings, sources across the political spectrum expect House Republicans to continue placing EPA in their crosshairs.

Lawmakers continue an almost daily messaging of press releases, hearings, letters and other actions highlighting agency measures and their effects. The GOP leadership has named the week of July 23 "Red Tape Week," where they intend to highlight the effects of EPA and other agency regulations and vote on a series of measures to strengthen the regulatory review process.

Similarly, Rep. Ed Whitfield (R-KY) has slated a series of forums on amendments to the Clean Air Act starting with a focus on the law's state implementation plan provisions late this month.

The environmentalist expects "pretty much more of the same" from the House "including overreach on everything" that will mostly be "political and for show."

A Democratic strategist notes those efforts will "not go anywhere in the Senate. The House is going to try and force the construction of the Keystone XL pipeline . . . but that is also not going to happen. Between now and the election there will be much heat but little light shed on energy issues."

The former Bush official says the transportation bill enacted into law this summer was "the last" legislative vehicle for environmental policy riders that could have moved before the election, but EPA critics fared poorly there -- failing to attach a controversial measure blocking EPA's pending coal ash rules. "I don't know of anything that was more likely to get through than [the coal ash measure] and it didn't, and it's hard to imagine anything else significant," says the first industry source.

The source notes that lawmakers are not even planning to move any appropriations measures before November.

Efforts likely to go nowhere include GOP bids to revoke EPA's GHG authority, nascent lame-duck efforts to impose a carbon tax and efforts to pass tax extenders for a range of energy credits such as biofuels and renewables, though several sources are holding out hope that the energy credits could be included in end-of-year "fiscal cliff" efforts.

A second environmentalist adds that long-sought reforms to the Toxic Substances Control Act (TSCA) still appear doomed despite a recent victory from longtime TCSA reform supporter Sen. Frank Lautenberg (D-NJ) in attracting GOP support.

EPA And The Election

Sources agree that EPA will not have a top-tier role in the presidential election between Obama and GOP challenger Mitt Romney, though the Democratic strategist expects Democrats to hint at agency stances when they talk about "protecting public health and protecting clean energy jobs of the future." The source adds Obama will continue to talk about his pro-environmental record of saving lives, spurring innovation and creating jobs.

The second environmentalist says activists are disappointed that Obama is not running more on his environmental record and "excoriating" Romney for his flip-flopping on climate change. Because of Romney's change in position, he is also not expected to bring the issue up much. "Obama has made a fundamental mistake on these issues and has tried not to popularize them, which he could have done," the source says.

But sources say that regardless of the election's outcome, there is likely to be a flurry of rules and other policies being issued after Nov. 8 -- including measures that are subject to legal deadlines, or, in the event President Obama loses his re-election bid, to leave traps for the administration of GOP challenger Mitt Romney.

"If there is no second term, I would expect EPA to finalize a bunch of rules that are not final," the first environmentalist says, adding EPA will also propose discretionary rules as well for the Romney administration to finalize or kill.

The second industry source also expects a flurry of November and December activity from EPA if Obama loses, with the hope of some of them becoming permanent, while a more tempered pace if he wins.

But a third industry source would expect a lame-duck EPA to "not try to put things through if [Obama] loses because they can be undone." -- *Dawn Reeves*

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Exhibit B

2 of 65 DOCUMENTS

Bozeman Daily Chronicle

July 31, 2012 Tuesday

SECTION: NATION; Pg. A.4

ACC-NO: 116114

LENGTH: 407 words

HEADLINE: As the election nears, new regs facing delays

BODY:

WASHINGTON (AP) -- When the Obama administration agreed to set the first-ever federal limits on runoff in Florida, environmental groups were pleased. They thought the state's waters would finally get a break from a nutrient overdose that spawns algae, suffocates rivers, lakes and streams and forms byproducts in drinking water that could make people sick.

Nearly three years later -- with a presidential election looming and Florida expected to play a critical role in the outcome -- those groups are still waiting. The rules, originally scheduled to take effect in March, now won't be active until next January, and even then could be replaced altogether by state-drafted regulations.

In fact, a growing number of regulations are being delayed at federal agencies or at the White House. The list includes a rule cracking down on junk food at school bake sales, another banning children from dangerous work on farms and one setting federal standards for disposing toxic ash from coal-fired power plants.

Together, the delays suggest caution by the administration at a time when President Barack Obama is increasingly under attack by Republicans and business groups for pushing regulations that they say will kill jobs or needlessly extend federal power.

"Issuing more regulations now would not help dispel the perception that President Obama's administration is 'anti-business,'" said John D. Graham, who from 2001 to 2006 headed the Office of Information and Regulatory Affairs, the White House's political gatekeeper for new rules. And with unemployment at 8 percent, "the Obama administration knows that more costly burdens on business will not create jobs. Those rules will have to wait until after the election."

It's not uncommon for rulemaking to slow during election years "because the White House does not want to create any controversy," Graham, now dean of Indiana University's School of Public and Environmental Affairs, wrote in an email to The Associated Press.

Just last week, the EPA announced it would wait until 2013 to issue a regulation aimed at reducing the number of juvenile fish and shellfish that die in power plants' cooling water intakes and would also tweak a rule requiring new power plants to control mercury and other toxic air pollution. Republicans and industry had charged that both rules would help "kill" coal as an electricity source by helping to shut down older plants and preventing new ones from being built.

LOAD-DATE: August 1, 2012

Exhibit C

POLITICO

EPA wears the bull's-eye

By: Jonathan Allen and Erica Martinson
June 20, 2012 09:21 AM EDT

This election year the EPA is toxic.

The Senate is voting on whether EPA planes can take pictures of farms — after it was mistakenly reported that drones were flying over the heartland. House Republicans want to cut the agency's funding to pre-1998 levels. And the president has threatened to veto a House bill, due up Wednesday, that would restrict Clean Air Act rules.

(Also on POLITICO: Energy issues crop up with farm bill)

Oh, and there were at least 10 — count 'em 10 — Capitol Hill hearings and markups on environmental matters Tuesday.

Forget drones, EPA could use a missile shield.

This week is just the latest round of a Republican attack that has forced the White House to hold back on new environmental regulations, lawmakers say — at least for now.

"They have slowed down some of that stuff, but it's only until after the election," Rep. Mike Simpson (R-Idaho) said. "After that, it's going to be scary."

Even some Democrats say the White House has responded to political reality in slowing down environmental regulations.

"The unrelenting attacks by the Republicans on environmental protection, I think, have caused people in the administration to be careful to pick their fights," said California Rep. Henry Waxman, the top Democrat on the House Energy and Commerce Committee.

To Republicans, the agency is the very embodiment of what they see as the worst of President Barack Obama and, as they see it, his liberal policies: big government reaching into the minutia of businesses.

And the drone rumor follows a list of other strange accusations plaguing the agency this year, like talk that it would start regulating farm dust (which it had no plans to do) and spilled milk (a trumped up version of reality).

"They are just an intimidating, overreaching, regulatory body," **Rep. Nick Rahall** (D-W.Va.) said of EPA. Rahall's state recently held a symposium on EPA's "War on Coal," a response to regulations now in effect and in the pipeline that could damage the coal industry.

Mitt Romney has hammered Obama over EPA policies during campaign stops in coal

country. For his part, Obama has warned that a Romney administration would roll back existing regulations to the detriment of public health, and his campaign has pointed to instances of Romney reversing past support for environmental regulations.

"It's not that people don't care in Missouri about the environment and it's not that they don't want some basic rules to make sure we have clean air and water," Sen. Claire McCaskill (D-Mo.) told POLITICO. "It's they don't want the overreach. And I think that's been a political talking point on the other side that has taken root particularly in the rural part of the state."

There are currently 25 EPA-generated rules held up in the review stage of the White House's Office of Information and Regulatory Affairs, more than any other Cabinet department or agency, according to the Office of Management and Budget. HHS, charged with implementing the president's health care law, has just 17 in that pipeline.

The full list of EPA rules in various stages of regulatory purgatory is much longer. They include mandates on coal ash, gasoline sulfur standards, Clean Water Act jurisdiction and industrial boilers. Gina McCarthy, the EPA's air chief, said Tuesday she doesn't know when the new boiler rule will be finalized.

"Still working on it," she told POLITICO. "Still working on it."

Last week, EPA sent a letter saying it isn't prepared to regulate greenhouse gas emissions from planes, and that it won't do so for engines on ships and other off-road vehicles and machines.

Some environmental groups say the agency should fight harder.

"The best defense against political attacks on the Clean Air Act is ambitious implementation of all its successful clean air programs, because they save lives and protect the climate. But when the EPA drags its heels on clean air implementation, big polluters and their lobbyists just sense weakness and redouble their attacks," said Kassie Siegel, the director of the Climate Law Institute at the Center for Biological Diversity.

But the stalled regulations don't tell the whole story. The Obama administration has finalized several significant environmental regulations — most under court orders — that have provided fodder for congressional cannons. They include greenhouse gas limits for new power plants, the mercury and air toxics rule at existing power plants, requirements to cut methane emissions at hydraulically fractured natural gas drilling sites, and a heavy hand overseeing mountaintop mining.

Sen. Lamar Alexander (R-Tenn.) is one of the few Republicans to embrace environmental regulations. He is a fan of a rule requiring costly power plant upgrades that would stop mecury and other toxins from getting into the air, and one that tries to protect downwind states from other states' pollution.

"That's what should have been done years ago. These pollutants were identified in the law in 1990, and 20 years later we're just getting around to doing what the courts have ordered EPA to do," Alexander said.

But for most Republicans and some Democrats the politics are clear: It's best to kick the EPA when it's down. Some are trying to block regulations that the administration is no longer pursuing.

McCaskill and Sen. Mike Johanns (R-Neb.) offered an amendment to the farm bill that would have stopped the EPA from implementing a farm dust rule that had been abandoned. (That amendment didn't make it onto the final list of 73 amendments being debated on the floor this week.) And McCaskill is proud of her efforts to block a child labor regulation from the Labor Department.

"I want to make sure no one forgets I had a part in killing both of them," she said.

For many environmental protection advocates, the battle is a partisan one. The Republicans who defended the EPA in the 1980s and 1990s are now gone. Waxman and Rep. Ed Markey (D-Mass.) published a report on Monday listing 247 votes the Republican-led House has taken since January of 2011 that they say would hurt environmental or public health policy.

And some on the left note that the House Republicans haven't really won many battles.

"The toxic cloud of anti-EPA rhetoric from congressional Republicans has had limited effect because the Senate and the president have kept most of their nasty little bills to gut our health and environmental protections from becoming law," David D. Doniger of the Natural Resources Defense Council said. "All this anti-EPA venom appeals to their base, but it is out of step with the majority of the American people, who consistently say they want EPA to do its job and they want Congress to keep its hands off the laws that protect our health and our environment."

But Republicans made clear late Tuesday that they have no intention of giving even an inch to the EPA. House Energy and Commerce Chairman Fred Upton (R-Mich.) and several members of his committee sent a letter to EPA and the White House suggesting that the federal government is overreaching in its research and regulation of hydraulic fracturing, also known as "fracking."

Sen. Jim Inhofe (R-Okla.), who is forcing a Wednesday vote on repealing the EPA's rule limiting mercury and other air pollutants from power plants, sent a letter to the agency's inspector general asking for an investigation into a controversial natural-gas enforcement case in Texas.

And the White House is fighting back against congressional Republicans. OMB issued a veto threat Tuesday against a House energy bill that it says would block implementation of rules associated with the Clean Air Act.

Darren Goode contributed to this story.

This article first appeared on **POLITICO Pro** *at 9:23 p.m. on June 19, 2012.*

Exhibit D

POLITICO
MORNING MONEY
Political Intelligence at the intersection of Washington and Wall Street

POLITICO

President Obama's administration slow-walks new rules

By: Darren Samuelsohn and Jonathan Allen
July 12, 2012 04:35 AM EDT

It's a staple of Mitt Romney's talking points: President **Barack Obama** and his lefty lieutenants have stifled economic growth with a Politburo-style regulatory regime.

After all, the president dropped two of the biggest regulatory bombs in memory with the **Dodd-Frank Wall Street Reform** and a **health care law** that gives the Health and Human Services Department sweeping authority to run a whole new insurance system.

But now Obama's making it tougher to put costly new rules in place. His enforcer: **Cass Sunstein**, an old buddy from their University of Chicago days whose friendship with the president gives him more clout in the West Wing than many advisers of higher rank. Sunstein has imposed what is essentially a soft freeze on new regulations.

Even though that's not official policy, the administration has been increasingly frugal in issuing regulations, according to a POLITICO review of government data and more than two dozen interviews with current and former administration officials, lawmakers in both parties, business leaders and liberal activists. The analysis of the federal rule-making database shows Obama as of Tuesday had issued 1,004 final regulations since arriving in office. That's fewer than his two immediate predecessors, George W. Bush and Bill Clinton. This year, Obama is also on pace to put out the fewest "economically significant" regulations of any year in his presidency.

In classic Washington fashion, the administration's slowdown of new rules is making liberals mad and winning Obama no credit from Republicans or the business community — especially not in an election year in which the over-regulator meme is so prevalent.

Some say he truly believes in regulatory restraint during tough economic times. Others see a crass political calculation at play: Don't give **Romney** any more ammunition before the election — and then open the floodgates after the polls close.

Either way, the result is the same.

Most agencies aren't even on the scoreboard with big-ticket rules this year: The Environmental Protection Agency: two major regulations, clamping down on emissions from petroleum refineries, and on oil-and-gas drilling operations. The Department of Justice: One, on prison rape. Treasury: One, on Dodd-Frank.

Republicans "just assert stuff and the facts have never encumbered them. I think there's a sense that Democrats are regulation-bound or regulation-minded and so the assertion sticks. I don't think it's any more complicated than that," said Harold Ickes, who served as deputy chief of staff to Clinton and then counted delegates for Hillary Clinton when she ran against Obama.

Romney has linked the administration's rule-making to his larger narrative about Obama's job-killing agenda.

In Michigan last month, the Republican led a call-and-response asking a crowd if it wanted "four more years of Obamacare," "four more years of Dodd-Frank" and "four more years of energy policies that say we can't use our oil and our coal and our gas."

And here's what he said in March in Illinois: "Day by day, job-killing regulation by job-killing regulation, bureaucrat by bureaucrat, this president is crushing the dream and the dreamers, and I will make sure that finally ends."

GOP-aligned groups are reinforcing the message.

American Crossroads is running an ad quoting Cecil Roberts, president of the United Mine Workers of America, discussing concerns about rules to limit coal pollution. "Our health care, pensions and way of life are on the line," a narrator warns. "Say no to the Obama administration's extreme EPA rules."

Clearly sensitive to the attacks, Obama has defended himself on the trail.

"I don't believe every regulation is smart, or every tax dollar can be spent wisely," Obama said at a campaign rally last month in Durham, N.H.

Facts can be tricky things, as evidenced by a House Energy and Commerce Committee news release issued last month June when EPA bowed to industry demands to soften a proposal regulating cement kilns — to the consternation of environmentalists.

In the same sentence, Rep. John Sullivan (R-Okla.) called the industry-friendly rule a "welcome development" while still denouncing the "EPA's radical regulatory agenda."

Experts on federal regulations say that rule-making often slows down in an election year but that it's particularly acute now because Republicans have focused so much attention on that element of the president's work.

"They're just incredibly afraid of the job-killing label," OMB Watch President Katherine McFate said.

Agency officials say the White House is so obsessed with depriving Republicans of fresh ammunition that Sunstein has moved beyond the traditional role of reviewing regulations to dip into minor matters that don't rise to his level as head of the Office of Information and Regulatory Affairs, such as guidance from the agencies to the states.

"They are asserting their review authority over lesser and lesser things," an EPA official said.

Regulations are a methodical and essential part of any administration's governing once the legislative sausage-making is complete. Agencies must follow strict administrative requirements to propose rules, accept public comment and then finalize their plans — all with the Office of Management and Budget keeping close tabs on the process.

Obama's regulatory policies have caused heartburn for agency officials and advocates who see months and years of work blocked by the White House internal review process.

Ideas stuck on the drawing board include an EPA plan to reduce mercury waste from dentist offices, an Occupational Safety and Health Administration update to protect workers from exposure to crystalline silica dust and Energy Department efficiency standards for walk-in freezers.

Sunstein said the number of economically significant regulations that come out in any given month or year depends on several factors — but not politics.

"The president has made clear his priority is getting out of a tough economic situation," Sunstein told POLITICO. "From the time I got here, my priority was to make sure our regulatory framework fit with economic priorities. If you have expensive rules, you want to make sure they are amply justified."

So far, the number of Obama's regulations trails those of his predecessors. After the midterms, Bill Daley entered the White House as chief of staff. He courted the U.S. Chamber of Commerce and promised to make the administration more business-friendly.

While the overall number of final Obama rules was slightly higher the year after the 2010 mid-terms, the number of economically significant rules — which have either a $100 million price tag or $100 million in public health benefits — dropped from 70 in 2010 to 55 last year, according to a search of the economically significant rules listed in the OMB database. This year, nearly a third of the big-ticket rules — eight of 25 — have been related to implementing the health care law.

The length of time regulations sat at OMB for review also has increased by more than three weeks since the 2010 elections, from an average of 45 days before to 67 days after.

And here's how Obama's 1,004 rules completed as of Tuesday compares overall with his predecessors: George W. Bush had completed 1,073 rules at the same point in office, Clinton 1,775, according to the OMB database. In September 1993, Clinton issued an executive order that narrowed the definition of a economically significant rule and the number of rules reviewed by the White House.

"Just the fact is we haven't had as many as our predecessor," Sunstein said. "That's suggestive that there's been some discipline."

Sunstein, once a target of conservative commentator Glenn Beck, has now become a lightning rod for agency officials and liberal activists. His office, which is part of the White House OMB, can make or break new regulations — and, more frustrating to some folks in the administration, tweak them just enough at the last minute to tip the balance more toward industry.

A hard-nosed number-cruncher known for halting regulations if he determines they would burden business more than they would benefit the public, Sunstein has the added gravitas of coming into his job in September 2009 as a friend of Obama's.

"I can talk to him if I need to," Sunstein said. "But he has a lot of things to do, so I want to work under his guidance without diverting him from other things like wars and averting a depression."

Sunstein's "strength in the administration appears to be increasing over time," said John Graham, George W. Bush's first regulatory chief and now dean of the Indiana University School of Public and Environmental Affairs. Graham noted that Sunstein has pushed

through a pair of regulatory reform initiatives that eliminate red tape at agencies and kill redundant rules, an effort that should help Obama improve his image with industry.

"The more visible OIRA becomes in regulatory reform, the more it will relieve the widespread concern that President Obama is anti-business," Graham said.

A former Obama administration official told POLITICO that Sunstein's influence also has grown since OMB Directors Peter Orszag and Jack Lew moved on, elevating Jeff Zients to the role of acting chief.

"Cass is in the enviable position of being very close to the president, and he is therefore able not only to read him well but also to reflect him well," said Sally Katzen, former Clinton regulatory chief and now senior adviser at the Podesta Group.

In the interview, Sunstein touted a range of rules that he said have gotten the government solid bang for its buck: roughly $91 billion in net public health benefits and consumer savings through the first three fiscal years of Obama's term. He cited new fuel economy regulations that will reduce the number of trips Americans need to make to the gas station and a salmonella rule that's preventing up to 79,000 illnesses a year. There have also been other efforts, including replacing the food pyramid with a graphic that displays food categories on a plate.

"If you've got a rule that prevents a serious harm to people who can't in some cases really protect themselves, that's good," Sunstein said.

Obama-era regulation implementation costs also have peaked at just more than $9 billion in a single year. "We didn't hit the [George W.] Bush high" of $10 billion, nor the highs during the prior three administrations — Clinton, George H.W. Bush and Ronald Reagan — which were all well over $10 billion, Sunstein said.

Speaking Friday in Pittsburgh, Obama went on offense on regulations, saying Romney plans to eliminate rules "that we just put in place to make sure that Wall Street doesn't act recklessly and we can prevent another taxpayer-funded bailout when the financial system goes out of whack; regulations that protect our air or our water; regulations that protect consumers from being taken advantage of."

Democratic lawmakers defend Obama's regulatory record.

"From the beginning, they've been trying to balance the equities there," said Rep. Chris Van Hollen (D-Md.). "My sense is that they work very hard to be reasonable both in protecting the public health and protecting consumers but doing it in the most cost-effective way."

While Republicans are not holding back in their criticism, most industry groups are far more restrained. Some acknowledge the numbers show a less aggressive government than the political rhetoric suggests. Others don't want to upset Obama for fear he'll unleash many more rules if he wins a second term.

"It's probably accurate to say the regulations, the economically significant regulations, have been fewer," said Bill Kovacs, a senior vice president of the U.S. Chamber of Commerce, who noted the Obama EPA hasn't exercised its full authority under the Clean Air Act in regulating power plants. So far, EPA has proposed rules only for new facilities and postponed until after the election a much more costly set of requirements on the

nation's aging electric utilities.

"The president has said, 'Hey, we've got to slow this down,'" said Rep. Lee Terry (R-Neb.). "We can't have more layoffs in October and November."

Rep. Mike Simpson, the Idaho Republican who is in charge of EPA's annual spending bill, predicted an Obama defeat would unleash a torrent of midnight regulations from Obama before Romney is sworn in.

And "if he is reelected," Simpson added, "it's hellbent for leather."

EXHIBIT B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

August 29, 2012

OFFICE OF
ENVIRONMENTAL INFORMATION

Mr. Matthew Forys
Landmark Legal Foundation
19415 Deerfield Avenue
Suite 312
Leesburg, VA 20176

RE: Request Number HQ-FOI-01861-12

Dear Mr. Forys:

This is in response to your request for a fee waiver and expedited processing in connection with your Freedom of Information Act (FOIA) request to the U.S. Environmental Protection Agency (EPA) seeking a copy of records regarding any EPA rule or regulation for which public notice has not been made, but which is contemplated or under consideration for public notice between January 1, 2012 and August 17, 2012.

We have reviewed your fee waiver justification and based on the information provided, we are granting your request for a fee waiver. However, this fee waiver does not include a waiver of fees for otherwise publically available records.

We have reviewed your expedited processing justification and based on the information provided, we are denying your request for expedited processing. You have not demonstrated that the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The EPA will respond to your information request as expeditiously as possible.

Under the FOIA, you have the right to appeal this determination to the National Freedom of Information Office, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460 (U.S. Postal Service Only), E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania

FedEx US Airbill
Express
FedEx Tracking Number
8748 1590 0963
8748 1590 0963
fedex.com 1800.GoFedEx 1800.463.3339
1 From
Date
Sender's Name
Phone
Company
Address
City
State
ZIP
2 Your Internal Billing Reference
3 To
Recipient's Name
Phone
Company
Address
We cannot deliver to P.O. boxes or P.O. ZIP codes.
Address
Use this line for the HOLD location address or for continuation of your shipping address.
City
State
ZIP
4a Express Package Service
Packages up to 150 lbs.
FedEx Priority Overnight
FedEx Standard Overnight
FedEx First Overnight
FedEx 2Day
FedEx Express Saver
Packages over 150 lbs.
4b Express Freight Service
FedEx 1Day Freight
FedEx 2Day Freight
FedEx 3Day Freight
5 Packaging
FedEx Envelope*
FedEx Pak*
FedEx Box
FedEx Tube
Other
6 Special Handling and Delivery Signature Options
SATURDAY Delivery
No Signature Required
Direct Signature
Indirect Signature
Does this shipment contain dangerous goods?
No
Yes
Dry Ice
Cargo Aircraft Only
7 Payment Bill to:
Sender
Recipient
Third Party
Credit Card
Cash/Check
Total Packages
Total Weight
Total Declared Value
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EXHIBIT C

LANDMARK
LEGAL FOUNDATION
THE RONALD REAGAN LEGAL CENTER

September 14, 2012

Via Express Mail

National Freedom of Information Officer
U.S. Environmental Protection Agency
1301 Constitution Ave., NW
Room 6416J
Washington, DC 20004
hq.foia@epa.gov

Re: **Freedom of Information Act Appeal**
Request Number HQ-FOI-01861-12
(Proposed Rules, Summer/Fall 2012)

To Whom It May Concern:

This is an appeal of the Environmental Protection Agency's ("EPA") erroneous denial of Landmark Legal Foundation's ("Landmark") request for expedited processing of its August 17, 2012 Freedom of Information Act Request. By Mr. Larry F. Gottsman's letter dated August 29, 2012, the EPA granted Landmark's request for a fee waiver but denied expedited processing. Specifically, the letter stated, "You have not demonstrated that the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual."

Left unaddressed was Landmark's demonstration of compelling need for the documents requested because Landmark is an entity "primarily engaged in disseminating information" and has an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. Section 552(a)(6)(E)(v); 40 CFR 2.104(e)(1)(ii). Mr. Gottsman's dismissive conclusion that Landmark has not demonstrated a "life or death" justification for expedited processing utterly disregards EPA's statutory duty for a fulsome consideration of FOIA requests. This is particularly troublesome given EPA's history of failing to comply both with the Act and with court orders in Landmark's previous FOIA litigation EPA. See Landmark Legal Foundation v. EPA, 272 F.Supp. 2d 70, 73 (D.D.C. 2003) (Agency's failure to comply with a U.S. District Court preliminary injunction order resulted in order that "EPA will be held in contempt, and ordered to pay sanctions . . . as a result of EPA's contumacious conduct").

I. Introduction

Landmark's original request, attached hereto as Exhibit A, requests public records related to published reports that the EPA is intentionally delaying the issuance of controversial new regulations until after the November elections. Landmark specifically seeks information relating to any EPA rule or regulation for which public notice has not been made, but which is contemplated or under consideration for public notice between January 1, 2012 and August 17, 2012.

As demonstrated below, Landmark met the statutory and regulatory requirements for expedited processing by demonstrating a compelling need, given the timeliness of this matter in light of the upcoming election as well as the seriousness of politicization of the EPA. Moreover, Landmark is a tax exempt organization with a long record of widely disseminating public records through various media outlets as part of its public education program.

II. Landmark's Request Should Receive Expedited Processing.

In order to receive expedited process under EPA regulations, a FOIA request must show a "compelling need" by either: (1) establishing that the failure to obtain the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; OR (2) if you are a person primarily engaged in disseminating information, by demonstrating that an urgency to inform the public that actual or alleged Federal Government activity. 40 CFR 2.104 (e)(i)-(ii) (2011) (emphasis added). See ACLU v. Department of Justice, 321 F.Supp. 2d 24, 27-28 (D.D.C. 2004).

A. There is a Compelling Need For Public Disclosure of the Requested Records.

There is a compelling need for the immediate release of the information requested. With respect to entities "primarily engaged in disseminating information," a compelling need is demonstrated by an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. Section 552(a)(6)(E)(v)(II). Among the factors to be considered as to whether there is a compelling need are "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." ACLU, 321 F.Supp.2d at 29.

The requested records relate directly to several matters of tremendous public interest and debate as shown by the attached exhibits, including the delay of the rulemaking process because of an upcoming election. Landmark attached a sample of the news reports covering the regulatory delay, which had been the subject of commentary by members of the United State Congress. This delay raises the possibility that the Obama Administration has improperly politicized the EPA, the possibility that the EPA's leadership is intentionally concealing its regulatory activity from an unwary public, and/or the possibility that the EPA's leadership is putting the partisan interests of a particular candidate above the safety of the general public by delaying controversial regulations. Each one of these issues is a matter for immediate and full disclosure.

There are many significant public interests implicated in the possibility that the EPA's activities have been politicized. The health and wellbeing of the public as well as the economic wellbeing of the country are at stake with improper environmental regulation. Delay puts these at risk and prevents the American public from being able to engage in timely, thoughtful debate over the extent of regulation and the management of the EPA. Furthermore, these issues regarding EPA's regulatory activities (the EPA's fulfillment of its responsibilities to inform the public and submit to appropriate congressional oversight, and the possibility that the EPA has put partisan interests above the health and wellbeing of the general public) should be considered by the American public before voting in this year's presidential and congressional elections.

The request makes clear that the records requested are of critical importance to an ongoing national debate -- the extent to which the EPA has been politicized and whether EPA officials are putting the partisan interests of a particular candidate above the transparent conduct of official business. There is no question that release of the records requested would be in the public interest because they would contribute significantly to the public understanding of "actual or alleged" activities of the government. See 5 U.S.C. Section 552(a)(6)(E)(v)(II).

Moreover, EPA has a history of failing to comply with Landmark's FOIA requests seeking records similar to those sought in this request. This in and of itself presents a compelling public interest justifying expedited processing of this request.

In short, Landmark meets the factors established by statute and regulation for a compelling need.

B. Landmark is Primarily Engaged in Disseminating Information.

As part of its mission as a tax-exempt, public interest law firm, Landmark investigates, litigates and *publicizes* instances of improper and/or illegal government activity. Courts have found that organizations with missions and information-dissemination activities similar to Landmark's are "primarily engaged in disseminating information." See, e.g., American Civil Liberties Union v. Dep't of Justice, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding that one of the plaintiffs is a public interest group that "gathers information of potential interest into a distinct work, and distributes that work to an audience" is "primarily engaged in disseminating information"). As demonstrated in its original request, Landmark will take various steps to disseminate responsive information to the public. Specifically, Landmark will post information on its web site; include the information in its newsletters; disseminate information via various widespread distribution technologies; publish articles in large circulation print media; and issue press releases to a wide range of media outlets.

In Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d 5 (D.D.C. 2003), the D.C. District Court found that a public interest group was "primarily engaged in disseminating information" for purposes of the FOIA. The court reasoned that the group "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience." Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d

5, 11 (D.D.C. 2003)(citing National Sec. Archive v. U.S. Dep't of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

Moreover, Landmark's work is discussed on hundreds of radio stations throughout the country on a regular basis on both national and local talk shows. Numerous newspapers, news programs, blogs and other media outlets also discuss Landmark and its work regularly. As noted on Landmark's website, one of "Landmark Legal Foundation's primary activities is to disseminate to the public information about the conduct of governmental agencies and public officials that runs afoul of constitutional limits or ethical standards." www.landmarklegal.org (last visited September 14, 2012). Landmark gathers information of potential interest to the public, especially those with a conservative viewpoint, analyzes the information, and then creates a report or summary of that information which it distributes to Landmark's audience through newsletters, reports, and its webpage. Landmark's audience includes its supporters, including official advisors, news media, visitors to its website and the general public when Landmark officials discuss the information in print, television and radio.

In Leadership Conf. on Civil Rights, the Court found that requestor Leadership Conference, a "nonpartisan coalition of over 180 national organizations representing men and women of all ethnic backgrounds and races" met the information dissemination standard. The Court stated:

> Plaintiff is primarily engaged in the dissemination of information regarding civil rights. Plaintiff's mission is to serve as the site of record for relevant and up-to-the minute civil rights news and information....Plaintiff disseminates information regarding civil rights and voting rights to educate the public, promote effective civil rights laws, and ensure their enforcement by the Department of Justice. Leadership Conf. on Civil Rights, 404 F. Supp. 2d 246, 260.

Similarly, Landmark Legal Foundation is primarily engaged in the dissemination of information. Much of this information is related to the federal government's violation of civil rights. Landmark has a long history of monitoring the activities of several federal agencies, including the EPA. Landmark established the first comprehensive database of EPA grants on its website. Landmark stays current on EPA activity, reviewing and commenting on EPA proposed regulations and assisting the challenges to EPA actions as *amicus curiae* in court. Landmark disseminates this information to its members and the readers of its newsletters and website. Landmark's ability to process EPA information and activities and convey it in an understandable manner to the public makes it highly sought after for its opinion and editorial content.

Upon receipt of the requested information in this matter, Landmark will promptly analyze and disseminate the requested material. Landmark will take several steps, among others, to ensure that the public has access to the information:

1. Landmark will post responsive information on its web site (www.landmarklegal.org), which is accessed regularly by thousands of individuals and makes the information available to potentially millions of citizens;

2. Landmark will utilize its extensive contacts in radio broadcasting to ensure proper public dissemination of requested records;

3. Landmark will include the information in its newsletter, which is distributed to thousands of individuals, groups, and the media;

4. Landmark will disseminate the information via its widespread distribution technology, which reaches hundreds of media outlets, reporters, editorial writers, commentators and public policy organizations;

5. Landmark staff will use the information to publish articles in print media, many of which are widely circulated. Landmark has successfully published such articles in the past;

6. Landmark will issue press releases to specific media outlets; and

7. Landmark staff will appear on television and radio programs.[1]

Landmark has a proven record of ensuring that information it receives through FOIA requests garners widespread attention in print, electronic and broadcast media. Landmark's investigations have been cited by the Associated Press, The Wall Street Journal, The Washington Post, The Washington Times, and Fox News Channel.

In short, Landmark meets the relevant definitions for a person primarily engaged in disseminating information and a compelling need.

III. Conclusion

If Landmark's FOIA Request is not expedited, the potential exists for spoliation of evidence that could demonstrate improper Agency conduct. Expediting Landmark's Request will allow Landmark – and the public – to understand an issue of national interest.

Please note, Landmark has previously been involved in extensive litigation arising from a governmental agency's failure to properly produce documents in accordance with its obligations under the FOIA. See Landmark Legal Foundation v. Environmental Protection Agency, 272 F.Supp.2d 70 (D.D.C. 2003). In that case, the EPA destroyed records in violation of a preliminary injunction and failed to properly circulate Landmark's Request to relevant departments within the Agency. Consequently, the Agency was found in civil contempt of court. Landmark expects the EPA to fully comply with the legal mandates set forth in the FOIA.

Furthermore, please provide assurances that EPA officials are taking steps to prevent destruction of repositories of information that may hold records responsive to this request.

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[1] See Judicial Watch, Inc. v. Rosotti, 326 F.3d 1309, 1314 (D.C. Cir. 2003). Here, the Court determined that an entity who provided "nine ways in which it communicates collected information to the public" sufficiently justified how disclosure would contribute to the public's understanding as to the activities of the federal government.

Additionally, be aware that any actions taken in contravention of the Agency's responsibilities will be raised if this request becomes the subject of litigation.

For the reasons stated above, Landmark asks that the EPA grant Landmark's appeal of the denial of its request for expedited processing. You may contact Matthew Forys at (703) 554-6100 if you have any questions. Please deliver responsive records to Mr. Forys's attention at the following address:

Matthew Forys
Landmark Legal Foundation
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176

Certification

Pursuant to Agency regulations and as required by law, I certify, to the best of my knowledge, that the above facts are true and correct.

Mark R. Levin
President
Landmark Legal Foundation

EXHIBIT D

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

September 19, 2012

Mark Levin
Landmark Legal Foundation
19415 Deerfield Avenue, Suite 312
Leesburg, VA 20176

Re: Freedom of Information Act Request HQ-FOI-01861-12-A (HQ-APP-00186-12)

Dear Mr. Levin:

This letter is being sent to acknowledge receipt of your FOIA appeal received in the offie of General Counsel on September 19, 2012.

Sincerely,

Barbara Bruce
FOIA Specialist
General Law Office

CONCURRENCES								
SYMBOL ▶	2377A							
SURNAME ▶	Bruce							
DATE ▶	9/19/12							

EPA Form 1320-1A (1/90) *Printed on Recycled Paper* **OFFICIAL FILE COPY**

EXHIBIT E

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

OCT 18 2012

Mark Levin
Landmark Legal Foundation
19415 Deerfield Ave, Suite 312
Leesburg, VA 20176

Re: Freedom of Information Act Appeal HQ-APP-00186-12 (HQ-FOI-01861-12)

Dear Mr. Levin:

I am responding to your September 14, 2012 appeal of a denial of expedited processing under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 ("Appeal Letter"). You appealed the August 29, 2012 letter from Larry F. Gottesman, National FOIA Officer of the U.S. Environmental Protection Agency (the "EPA" or "Agency") to deny your request for expedited processing of your FOIA request numbered HQ-APP-01861-12 ("Denial Letter"). Your request for a fee waiver for this FOIA request was granted, and you are not appealing the decision regarding your request for a fee waiver at this time.

You seek expedited processing of your FOIA request for documents and records regarding communications about proposed rules and regulations that have not been finalized between January 1, 2012 and August 17, 2012, specifically, "information relating to any EPA rule or regulation for which public notice has not been made, but which is contemplated or under consideration for public notice between January 1, 2012 and August 17, 2012." Your request was subsequently modified by limiting the search to senior officials in EPA HQ. Your request was made on behalf of the Landmark Legal Foundation, which you describe as a "tax-exempt, public interest law firm." FOIA Request Letter from Landmark Legal Foundation, August 17, 2012 ("Request Letter") at 7.[1] Your request for expedited processing was denied because "[y]ou have not demonstrated that the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual." Denial Letter, August 29, 2012.

I have carefully considered your initial request for expedited processing, the EPA's initial denial of your request, and your appeal. For the purposes of this appeal, I am not addressing the

[1] For purposes of this appeal, "you" and "your" refers to communications between the EPA and any representative of Landmark Legal Foundation regarding this FOIA request.

question of whether your request, as written, reasonably describes the records that you are requesting in order to constitute a proper FOIA request. For the reasons set forth below, I have concluded that your appeal requesting expedited processing should be, and is denied.

Analysis

In your appeal letter, you state that your request qualifies for expedited processing under 40 C.F.R. § 2.104(e)(i)-(ii), which provides for the EPA to take requests out of order and provide expedited processing when the EPA determines that such requests or appeals involve a "compelling need," as follows:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about an actual or alleged Federal government activity, if the information is requested by a person primarily engaged in disseminating information to the public.

In your appeal letter, you have not contended that the documents you request are required due to an imminent threat to the life or safety of an individual. Therefore, I will analyze your request for expedited processing under section (ii) of the EPA's regulations only.

"Person Primarily Engaged in Disseminating Information to the Public"

To qualify for expedited processing under 40 C.F.R. §2.104(e)(ii), a requester must establish that they are a person primarily engaged in disseminating information to the public. As EPA's regulations state at 40 C.F.R. §2.104(e)(ii)(3), in order to receive expedited processing under this provision, the requester must submit a statement certified to be true and correct to the best of your knowledge and belief, explaining in detail the basis for the request. *Id.* If you are not a full-time member of the news media, you must establish in that statement that you are a person whose primary professional activity or occupation is information dissemination, although it need not be your sole occupation. *Id.*

In your FOIA Request Letter, incorporated by reference in your Appeal, you state that your organization has a primary mission as a tax-exempt, public interest law firm, who investigates, litigates, and publicizes instances of improper and/or illegal government activity. Request Letter at 7. In your appeal, you noted that Landmark reviews and provides comments to EPA on proposed regulations and assist with challenges to EPA actions. You have not established that the Landmark Legal Foundation is primarily engaged in disseminating information to the public. You also claim that Landmark Legal Foundation "is discussed" by various third party media outlets and that Landmark has published articles in print media and

appeared on TV. However, you did not provide any evidence or examples. Research and advocacy that is covered by third party media, your group's public appearances, and information presentations do not demonstrate that Landmark Legal Foundation itself is primarily engaged in dissemination of information to the public.

For the reasons explained, I find that you have not established that you are a person primarily engaged in disseminating information to the public to meet the threshold requirement of 40 C.F.R. §2.104(e)(ii), and your appeal for expedited processing is denied on this basis.

Your request also does not meet the second element of the test for expedited processing because you have not demonstrated an urgency to inform the public about the government activity involved in the request beyond the public's right to know about government activity generally. 40 C.F.R. § 2.104(e)(ii)(3). Your request is not focused on any specific EPA activity or rule. Instead, your request asks the EPA to provide you broadly identified records based on your stated belief that proposed rules are being delayed for political reasons. The few news articles that you attached as Exhibits to your request and appeal indicate slight evidence of media interest in the general topic of politics and rulemaking. However, these articles and opinion pieces do not demonstrate substantial interest, either on the part of the American public or the media, in any particular issue which would be addressed by information responsive to your broad request. *See Am. Civil Liberties Union v. Dep't of Justice*, 2005 WL 588354, *12-14 (N.D. Cal. March 11, 2005) (citing *Al-Fayed v. Central Intelligence Agency*, 254 F.3d 300, 311 (D.C.Cir. 2001). You have therefore not demonstrated an urgency to inform the public.

Conclusion

This letter constitutes EPA's final determination on your appeal. In accordance with 5 U.S.C. § 552(a)(4)(B), you have the right to seek judicial review of this determination by instituting an action in the district court of the United States in the district in which you reside, or have your principal place of business, or in which the Agency records are situated, or in the District of Columbia.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 301-837-1996 or 1-877-684-6448; and facsimile, 301-837-0348.

Please call Jennifer Hammitt at (202) 564-5097 if you have further questions regarding this matter.

Sincerely,

Kevin M. Miller
Assistant General Counsel
General Law Office

cc: HQ FOI Office,

Larry F. Gottesman, National FOIA Officer